

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	
Federal-State Joint Board	)	CC Docket 96-45
On Universal Service	)	
	)	
Western Wireless Corporation	)	
Petition for Designation as an	)	DA 99-251
Eligible Telecommunications Carrier	)	
In the State of Wyoming	)	

REPLY TO OPPOSITION

To: The Common Carrier Bureau

Golden West Telephone Cooperative ("Golden West"), Project Telephone Company ("Project"), and Range Telephone Cooperative ("Range") (collectively "Rural Independents" or "Petitioners") file this Reply to the Western Wireless Opposition to Petitions for Reconsideration ("Opposition"), filed February 27, 2001. This Reply addresses the issues raised in the Rural Independents' Petition for Reconsideration filed January 25, 2001 regarding the Bureau's decision granting Western Wireless Eligible Telecommunications Carrier ("ETC") status in portions of their study areas.

**I THE OPPOSITION FAILS TO JUSTIFY DESIGNATION OF A SECOND ETC IN PORTIONS OF PETITIONERS STUDY AREAS**

A. The Requirement to Designate Second ETC in the Entire Study Area of a Rural Telephone Company is Unambiguous

Western Wireless' Opposition alleges that there is a "tension" between the requirement of Section 214(e)(5) that a second ETC serve the entire study area of an ETC and the grant of

jurisdiction to the Commission in Section 214(e)(6) in those areas where the state commission lacks jurisdiction.<sup>1</sup> This “tension” allegedly creates an ambiguity in the statute and demonstrates that the statute is based on an incorrect factual assumption. The Bureau’s decision to disregard Section 214(e)(5) is therefore asserted to be a logical resolution of this tension which is entitled to *Chevron* deference.<sup>2</sup>

Despite Western Wireless’ allegation, there is no ambiguity whatsoever in the Section 214(e) requirement to designate as a service area the entire study area of a Rural Telephone Company. *Chevron* makes clear that in such circumstances, analysis ends<sup>3</sup>.

Western Wireless provides no support for its contention that Congress was not aware that study areas occasionally overlap state lines. The fact that some study areas overlap state boundaries was known by the Commission prior to the enactment of both Section 214(e)(5) and 214(e)(6).<sup>4</sup> Congress is presumed to know the law in existence at the time it

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<sup>1</sup> Opposition at 17.

<sup>2</sup> Id.

<sup>3</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)

<sup>4</sup> The Commission has frequently stated that, correctly, that study areas are *generally* the operation of a company within a state, necessarily implying that there are exceptions. See, e.g., U.S. West Communications, Inc., Range Telephone Cooperative, Inc., RT Communications, Inc., Tri-County Telephone Association, Inc., TCT West and Union Telephone Company Expedited Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary, of the Commission’s Rules, *Memorandum Opinion and Order*, 9 FCC Rcd 4811 (1994). The Commission recently described a study area as generally in a state in the process of approving a multi-state study area. Valor Telecommunications of Texas, LP and GTE Southwest Incorporated, Joint Petition for Waiver of the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules, *Order*, 15 FCC Rcd 15816, 819 (2000)..

legislates.<sup>5</sup>

Even if Congress were not aware of multi-state study areas, Western Wireless provides no authority for its proposition that a misunderstanding by Congress empowers an agency to disregard the clear commands of the statute. To the contrary, the Commission's duty is to administer the law as written. There are, of course, situations in which a statute cannot be followed literally and an interpretation must be found which harmonizes the apparent internal conflicts to accomplish the will of Congress, but this is not such a situation. Congress was quite clear that the second ETC certification may not be granted in a portion area of the study area of a Rural Telephone Company *unless and until* the specified procedures are followed. Specifically, the statute unambiguously requires that before designation of service area different from a Rural Telephone Company's study area the state commission and the FCC, in accordance with the recommendation of a Joint Board, determine that a different service area should be established.<sup>6</sup>

The Petition for Reconsideration demonstrated that the FCC's lack of jurisdiction over an entire study area does not prevent a second carrier from attaining ETC status.<sup>7</sup> Either the procedure for establishing a service area different from the study area of a Rural Telephone Company can be followed, or grant in the portion of the study area over which the Commission does have jurisdiction can be conditioned upon grant by the other state of ETC designation in its jurisdiction. The existence of these alternatives, one provided by Congress, the other by common

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<sup>5</sup> *Cannon v. University of Chicago*, 441 U.S. 677, 696-699 (1979).

<sup>6</sup> 47 U.S.C. 214(e)(5), 47 C.F.R. 54.207(c) (Describing process to define a service area as other than the study area of a rural telephone company).

<sup>7</sup> Petition for Reconsideration at 9-10.

sense, precludes any conclusion that an unambiguous provision of a statute must be ignored in order to implement another.

Briefly stated, it is entirely possible to follow the statute's literal and unambiguous commands which are designed to ensure that second ETCs are not designated in Rural Telephone Company areas unless there is a conscious conclusion, by the appropriate regulator that to do so will be in the public interest. Similarly, the requirement to designate second ETC only in the entire study area of a Rural Telephone Company is intended to prevent cream skimming of a study area, but provides a process for a joint federal-state decision that designation of less than a study area is in the public interest. There is thus neither ambiguity or conflict in the statute.

B. The Prior State Designations of Petitioners Are Not Inconsistent with Petitioners' Theory of the Case

Western Wireless asserts that the original ETC designations of Petitioners by the respective states followed the model of only designating within their jurisdiction. The situation in 1997, however, was that each state acted within its jurisdiction, but all states were moving in the same time frame to designate all incumbents within their borders prior to the 1998 effective date of the requirement for ETC designation.<sup>8</sup> Petitioners have repeatedly stated that second ETCs could be designated by a similar process, but point out that no attempt was made to do so here.<sup>9</sup>

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<sup>8</sup> Western Wireless alleges that it would be discriminatory to require it to apply in the multiple jurisdictions in which a study area may be located because that procedure was not followed in the initial ETC designations of ILECs in 1997. Given the hundreds of instances in which ILEC service areas have minor overlaps with state boundaries, there be such cases. Whether or not those designations were all done correctly is irrelevant to the question of whether a second ETC can be designated in a portion of the study area of a Rural Telephone Company.

<sup>9</sup> The hearing examiner in the Texas case relied on by the bureau did order WW to obtain ETC status from Arkansas for the Arkansas portion of Southwest Arkansas Telephone

- C. Petitioner's Are Not Foreclosed from Raising the Entire Study Area Issue at this time where the Commission is presumed to follow the law and Western Wireless previous position was inconsistent with the Bureau's Order

Western Wireless asserts Petitioners should have brought up the multi-state study area sooner, and in hindsight the issue could have been anticipated, and the Bureau could have been reminded of the study area requirement of the Communications Act. Responsibility for raising the issue lies at least equally with Western Wireless as the applicant. As the Petition pointed out, this is not the first time the issue of multi-jurisdictional study areas has been brought before the Bureau by Western Wireless, and in the prior instance it acknowledged the requirement for designation in an entire study area and argued that the Commission's jurisdiction extended into the portion of the study area otherwise unarguably subject to jurisdiction of the state commission.<sup>10</sup> In any event, because the Commission is charged with administration of the Act, Petitioners should be able to rely on an assumption that the agency will follow the law, especially where the requirements are clear and the applicant has previously taken a position inconsistent with the Bureau's decision.

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Cooperative, but that requirement was overruled by the PUC. Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier, PUC Doc. Nos. 22289 and 22295, SOAH Doc. Nos. 473-00-1167 and 473-00-1168, Order, (Texas Pub. Util. Comm'n, rel. Oct.30, 200, 6-7, appeal pending *sub nom.* Texas Telephone Association and Texas Statewide Telephone Cooperative, Inc. v. Public Utility Commission of Texas, District Court of Travis County, Texas, No. GN100035.

<sup>10</sup> Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to Crow Reservation, Montana, Aug. 4, 1999, 14 and n. 26. The instant decision, however, remains one of first impression because the Crow application has not been resolved.

**II IF THE REQUIREMENTS OF THE ACT ARE AMBIGUOUS AND/OR BASED ON INCORRECT ASSUMPTIONS BY CONGRESS, THEN THE BUREAU'S DECISION EXCEEDED ITS DELEGATION.**

Assuming, *arguendo*, that Western Wireless is correct that the requirements of Section 214(e) are ambiguous, or based upon an incorrect assumption of facts by Congress, then it cannot also be true that the Bureau's decision was within the scope of its delegation. As Petitioners' pointed out the Bureau's authority does not extend to "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."<sup>11</sup> The question of whether the Commission can disregard the statutory command of one portion of Section 214(e) in order to "harmonize" it with another is a question of first impression and therefore a novel issue of both fact and law. Western Wireless responds by asserting: (1) all petitions have new facts and "implementation details, therefore its logical that the Bureau's authority extends to this issue; (2) the decision was within the authority delegated to the Bureau in the *Twelfth Report and Order*; and (3) the Bureau has often acted on study area waivers, which shows that fact specific implementation matters are within the Bureau's authority.<sup>12</sup>

The first suggestion that all petitions raise novel issues, even if factually correct, would mean that the exclusion from the Bureau's delegated authority is meaningless, and should be interpreted to mean that the Bureau can decide any and all issues coming before the Commission. As a practical matter this suggestion is not even correct. For example, the study area waivers cited

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<sup>11</sup> Petition at 11

<sup>12</sup> Opposition at 9. Western Wireless does not address the further point raised in the Petition that the Commission's Rules do not provide for subdelegation of the authority delegated to the Chief, Common Carrier Bureau. Petition at 11, n. 30.

by Western Wireless have typically presented similar factual and legal issues and are generally resolved with similarly worded orders.

The *Twelfth Report and Order* provided further details regarding the application and decision making process for applications under Section 214(e)(6) on both tribal lands and non-tribal lands beyond the instructions provided in a 1997 Public Notice.<sup>13</sup> Nowhere in that order does the Commission address the authority of itself or a state commission to grant ETC designation where a study area is subject to multiple jurisdictions, much less delegate to the Bureau the authority to resolve such issues. Indeed, the only specific delegation to the Bureau is to “modify, or require the filing of, any forms that are necessary to implement the decisions and rules adopted in this Order.”<sup>14</sup>

The multitude of study area waivers which the Bureau has granted or denied over the years provides no support for the proposition that the Bureau has delegated authority to establish a second ETC’s service area as something other than its study area. First, the issue in the study area waiver cases is whether an incumbent LEC may change the geographic boundaries of the area over which it determines its interstate costs from what the boundaries were in 1994.<sup>15</sup> A Section 214(e)

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<sup>13</sup> Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208, 12255-12277 (2000) (“Twelfth Report and Order”).

<sup>14</sup> Id. At 12300.

<sup>15</sup> U S West Communications, Inc., and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix Glossary of the Commission’s Rules, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 (1995). (“Eagle Order”).

service area designation, however, does not change study area boundaries of the LEC, but establishes the area in which an ETC is obligated to offer the supported services in return for receipt of universal service support.<sup>16</sup> A valid delegation to resolve one type of waiver is not a delegation to act on an unrelated type of application. Second, besides being unrelated, the study area waivers were resolved under explicit Commission decisions.<sup>17</sup>

There is no question that fact specific situations may be within the Bureau's delegated authority, but the unambiguous limitation in the Commission's rules on the Bureau's authority is to "novel" facts and there are "outstanding precedents and guidelines" governing facts of the type raised in this case. This absence of guidelines is in contrast to the Bureau's initial grant of ETC designations to the tribal companies in Arizona. Although these were the first actions under Section 214(e)(6), the statute and the Commission's rules provided ample guidance to determine that under the facts presented, the state commission did not have jurisdiction and that the companies met the requirements of Part 54 of the Commission's rules.<sup>18</sup>

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<sup>16</sup> 47 U.S.C. 214(e)

<sup>17</sup> Eagle Order

<sup>18</sup> Designation of Fort Mojave, et al. As Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Memorandum Opinion and Order, DA 98-392, rel. Feb. 27, 1998. Although as the Twelfth Report and Order correctly concluded, the Commission's jurisdiction under Section 214(e)(6) is not limited to applications of tribally owned companies. Nevertheless, the Bureau had explicit guidance from the legislative history which indicated that the ETC status of those companies was a particular concern of Congress.



### **III THE BUREAU'S DECISION CANNOT BE JUSTIFIED UNDER THE COMMISSION'S FORBEARANCE AUTHORITY**

Western Wireless attempts to justify the Bureau's decision with the argument that the circumstances of this case meet the criteria for forbearance under Section 10. Petitioners do not agree that those criteria are met, but in any event, forbearance is not available as a *post hoc* matter. Rather the Commission must make the detailed findings specified in that section, after which the requirements are forborne. It should also be noted that there is no suggestion that the Commission has delegated forbearance authority to the Bureau.

### **IV CONCLUSION**

The Opposition to the Rural Independent's Petitioner for Reconsideration fails to justify the Bureau's designation of Western Wireless as an ETC in portions of the study areas of Rural Telephone Company's or to explain why the Bureau's departure from an unambiguous statutory provision was within its delegated authority. The Petition should therefore be granted.

Respectfully submitted,

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By: 

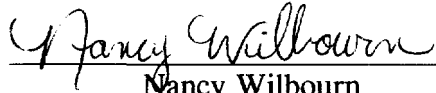
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March 9, 2001

**CERTIFICATE OF SERVICE**

I, Nancy Wilbourn, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Reply to Opposition" was served on this 9<sup>th</sup> day of March, 2001 by first class, U.S. mail, postage prepaid or by hand delivery to the following parties:

  
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